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Anita L. Allen

*University of Pennsylvania Carey Law School*

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## TAKING LIBERTIES: PRIVACY, PRIVATE CHOICE, AND SOCIAL CONTRACT THEORY

Anita L. Allen\*

Decisional privacy arguments—arguments premised on the value of freedom from coercive interference with decisionmaking affecting intimate and personal affairs—are among the strongest for maintaining permissive abortion laws. Yet philosophers and legal theorists from diverse segments of the scholarly community have pointed to decisional privacy arguments for permissive reproductive rights policies as prime examples of conceptual confusion, male ideology, and judicial overreaching. First, conceptual confusion has been seen in the use of the expression “privacy” to describe freedom to choose whether to give birth to a child. Second, male ideology has been seen in the articulation of reproductive liberty as a matter of privacy for women, when it is still men who dominate private life and ultimately decide women’s procreative fates. And third, judicial overreaching has been seen in the Supreme Court’s reliance upon an unenumerated constitutional right of privacy as a substantive limitation on legislation intended to protect unborn life, women’s health, and the family. Each of these criticisms amounts to a recommendation that reproductive rights analysis be purged of decisional privacy arguments.

This Article is a defense of decisional privacy arguments against charges of conceptual confusion, male ideology, and judicial overreaching. In response to *Griswold v. Connecticut*,<sup>1</sup> *Roe v. Wade*,<sup>2</sup> and other reproductive rights cases, a great deal has already been written about decisional privacy. Rather than exhaustively reassess all the important issues that bear on the jurisprudence of decisional privacy, I undertake a pair of more limited tasks.

In Parts I and II, I clarify the senses in which privacy is importantly at stake in the choice among competing reproductive rights policies. “Privacy” can refer either to conditions of restricted access or to decisionmaking free from coercive interference. In Part I, I argue that pernicious conceptual confusion about the meaning of constitutional privacy, stemming from a failure to carefully distinguish privacy in its restricted-access and decisional senses, tarnished the Court’s earliest procreative rights opinions but does not mar the

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\* Associate Professor, Georgetown University Law Center; J.D., Harvard Law School; Ph.D., M.A., University of Michigan; B.A., New College.

1. 381 U.S. 479 (1965).

2. 410 U.S. 113 (1973).

most recent abortion cases. The "conceptual confusion" objection is thus no excuse either for discounting the importance of judicial protection of fundamental reproductive liberties, or for ignoring the respects in which privacy is genuinely at stake in the choice among competing abortion policies. In Part II, I argue that there can be no "male ideology" objection to decisional privacy. The exercise of privacy-promoting liberties is important for women. It can foster traits and conditions feminists have long deemed paramount, including self-determination, participation as equals, and social contribution on a par with innate capacities. Our society would do women an injustice were it to deny them decisional privacy rights on the ground that some men will exploit women's rights to their own advantage.

Part III is devoted to a close critical analysis of David A.J. Richards' decisional privacy argument for permissive abortion laws. Richards' argument deserves more than casual attention. The publication in 1971 of John Rawls' *Theory of Justice* revived scholarly interest in social contract theory<sup>3</sup> and its implications for the law,<sup>4</sup> while Ronald Dworkin's writings<sup>5</sup> have stimulated widespread assessment of liberal rights-based approaches to jurisprudence.<sup>6</sup> Richards' contractarian, liberal rights-based theory of constitutional interpretation has importance as among the most sophisticated theories of its kind. Responsive to the demands of history, morality, and politics, Richards' view that substantive political theory controls

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3. The social contract theories advanced by contemporary thinkers who continue in the contractarian tradition of Locke, Rousseau, and Kant depict "an idealized moral conception of persons as free, rational, and equal," D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 41 (1986), and hold that, as a prerequisite of justice, governmental constraints on freedom must have the consent of the governed. See generally *id.* at 41, 57-63.

4. See, e.g., H. BLOCKER & E. SMITH, *JOHN RAWLS' THEORY OF SOCIAL JUSTICE* (1980) (collected essays introducing reader to extensive body of literature surrounding Rawls' theory of social justice); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (advocating primacy of justice but rejecting leading liberal and libertarian theories); Lyons, *Nature and Soundness of the Contract and Coherence Arguments*, in *READING RAWLS* 141 (N. Daniels ed. 1974) (discussion of Rawls' social contract theory).

5. R. DWORKIN, *LAW'S EMPIRE* (1986); *A MATTER OF PRINCIPLE* (1985); *TAKING RIGHTS SERIOUSLY* (1977).

6. Broadly construed, liberalism is the view that individuals are entitled to extensive personal liberty and the economic protections called for by such liberty. Liberals come in many varieties. There are libertarians, conservatives, liberals, welfare state liberals, and so on. Liberals disagree about the nature of the liberty to which persons are entitled and about the nature of the economic rights adequate liberty entails. See generally NOMOS 25: *LIBERAL DEMOCRACY* (J. Pennock & J. Chapman eds. 1983) (collection of essays on equal representation, federal democracy, judicial review, freedom of speech, justifications for liberal democracy); *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* (M. Cohen ed. 1983) (collection of essays assessing Dworkin's theories).

constitutional interpretation and judicial review merits applause as a reasoned alternative to strict constructivist<sup>7</sup> and positivist theories.<sup>8</sup> My main concern will be whether Richards' decisional privacy argument for abortion rights, set, as it is, in a broad, contractarian theory of constitutional interpretation, furthers efforts to justify permissive reproductive rights policies.

Richards' account of why women ought to have procreative free choice substantiates major strands in what I will refer to as the "feminist moral stance" for permissive abortion legislation. In Part III, I contend that although the woman-centered conclusion of Richards' decisional privacy argument for fundamental abortion rights is correct, his premise that unborn life lacks public moral significance is inadequately defended. I propose a cure for the defective premise, inspired by Dworkin's contractarian conception of the constraints on just government imposed by the ideal of liberal equality. I suggest that the amended version of Richards' decisional privacy argument is morally compelling. However, I acknowledge that the contractarian foundations of his argument would doubtlessly lead some feminists to reject the insights it offers into the case for women's procreative liberty.

## I. CONCEPTUAL CONFUSION

### A. *Two Uses of "Privacy"*

Is the concept of privacy too vague and indefinable for application in the law?<sup>9</sup> Privacy is certainly an elastic concept. The expression "privacy" has numerous connotations.<sup>10</sup> Theorists have recommended that policy-makers and courts discontinue uses of "privacy"

7. Strict constructivism is the view that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980); see, e.g., R. BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

8. Legal positivism is the idea that statements about what law is are true or false and can be verified by empirical data drawn from the history of legal institutions. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 33-34; see, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961); J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J. Burns & H. Hart rev. ed. 1970) (1791).

9. Several scholars who commented on the Supreme Court's initial application of a constitutional right of privacy described privacy as a vague, indefinable concept. See, e.g., Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197, 199 (1965) (few doctrines are more vague or less amenable to definition and structured treatment than privacy); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967) (concept of privacy is infected with pernicious ambiguities); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281, 281 (1966) (idea of privacy is vague and difficult to get into perspective).

10. See Shils, *supra* note 9, at 281.

that obscure and confuse.<sup>11</sup> However, the concept of privacy is by no means too vague for the law. Clarity about legal uses of the expression "privacy" can be achieved where the basic distinction between, first, privacy *simpliciter* (restricted access) and, second, private choice or decisional privacy (freedom from interference with appropriately private affairs) is preserved. Further clarity is achieved by consistent uses of terms like "solitude," "secrecy," and "anonymity" that refer to distinct forms of privacy.

Two distinct usages of "privacy" have come to have a place in the law.<sup>12</sup> Under the first usage, "privacy" refers to conditions of restricted access. This usage is in keeping with the popular theoretical definitions of "privacy" as the inaccessibility of persons, their mental states, and information about them to the senses and surveillance devices of others.<sup>13</sup> Seclusion and solitude are two forms of privacy<sup>14</sup> in the restricted access sense. They relate to physical separation or isolation from others. Several forms of privacy in the restricted access sense relate to information nondisclosure. They are

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Numerous meanings crowd in on the mind that tries to analyze privacy: . . . private property; . . . interest in name and image; . . . keeping of one's affairs to one's self; . . . internal affairs of a voluntary association or of a business corporation; . . . physical absence of others . . . ; desire . . . not to disclose or to have disclosed information . . . ; sexual and familial affairs . . . ; desire not to be observed . . . ; . . . private citizen in contrast with the public official; and these are only a few.

*Id.*

11. See, e.g., Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980) (to be useful, concept of privacy must denote something distinct and coherent); Parent, *Privacy, Morality and the Law*, 12 PHIL. & PUB. AFF. 269, 269 (1983) (privacy should be defined with clarity and precision).

12. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (privacy cases have involved protection of interests both in avoiding disclosure of personal matters and in independence in making certain kinds of important decisions).

13. See A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 11, 15 (1987). Similar restricted access definitions have been relied upon by many theorists from the fields of law, philosophy, and social science. See, e.g., D. O'BRIEN, *PRIVACY, LAW AND PUBLIC POLICY* (1979) (law); S. BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* (1984) (philosophy); I. ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR* (1975) (social science).

14. There is considerable disagreement over what, if anything, can be aptly understood as a form of privacy. The usual candidates for the privacy family are secrecy, confidentiality, reserve, seclusion, solitude, solace, intimacy, modesty, and isolation. I construe terms denoting modes of personal inaccessibility as terms denoting forms of privacy. See A. ALLEN, *supra* note 13, at 18. But see Parent, *Recent Work on the Conception of Privacy*, 20 AM. PHIL. Q. 341, 346-47 (1983) (concepts in privacy family are wholly distinct). There has been especially striking disagreement over the relationship between secrecy and privacy. See, e.g., S. BOK, *supra* note 13, at 10-14 (secrecy and privacy distinct concepts); Friedrich, *Secrecy Versus Privacy: The Democratic Dilemma*, in 13 NOMOS: PRIVACY 105, 106 (J. Pennock & J. Chapman eds. 1971) (privacy is form of secrecy); Gavison, *supra* note 11, at 428 (secrecy is form of privacy).



secrecy, confidentiality, and reserve. Anonymity, construed broadly to include limited attention paid to persons as well as nondisclosure of their identities, is also a form of privacy in the restricted access sense.

The invasion of privacy torts<sup>15</sup> protect interests in seclusion, information nondisclosure, and anonymity by making highly offensive intentional diminutions of privacy actionable wrongs. As numerous courts have asserted, the purpose of the invasion of privacy torts is to protect the sensibilities, feelings, and inviolate personalities of natural, living persons.<sup>16</sup> The federal Constitution also protects privacy in the restricted access sense. For example, the fourth amendment limits warrantless search and seizure, thereby protecting individual and corporate interests in seclusion, information nondisclosure, and anonymity.<sup>17</sup> Numerous state and federal statutes, and provisions of some state constitutions, are also designed to protect interests in seclusion, anonymity, and information nondisclosure.<sup>18</sup>

Under its second usage in the law, which appears to be derivative of the public/private distinction,<sup>19</sup> "privacy" refers to an aspect of

15. The four widely-recognized invasion of privacy torts are unreasonable intrusion upon seclusion, publication of private facts, publication placing another in a false light, and appropriation of name, likeness, or identity for commercial purposes. RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

16. See generally R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* (1980) (discussion of law of privacy and defamation). "Inviolable personality" was the phrase used by Warren and Brandeis to describe the interest protected by privacy rights. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

17. Cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (fourth amendment protects homes and commercial premises from unreasonable warrantless searches by federal regulatory agencies); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 (1973) ("[A]spects of the First, Fourth and Fifth Amendments . . . limit the ways in which, and the circumstances under which, the government can go about gathering information about a person he would rather it did not have. . . . [L]imiting governmental tapping of telephones . . . plainly involves . . . general concern with privacy."). See generally D. O'BRIEN, *supra* note 13 (fourth amendment is very close to express privacy protection).

18. See, e.g., The Privacy Act of 1974, 5 U.S.C. § 552a (1982 & Supp. III 1985) (disclosure of records requirements); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1982 & Supp. III 1985) (disclosure of educational records requirements). See generally R. SMITH, *COMPILATION OF STATE AND FEDERAL PRIVACY LAWS* (1978-79, 1981, 1984-85) (noncumulative editions); U.S. DEPARTMENT OF JUSTICE, *COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: PRIVACY AND SECURITY OF CRIMINAL HISTORY INFORMATION* (1984).

19. The public/private distinction has been praised as the normative cornerstone of liberal society. See, e.g., Berns, *Privacy, Liberalism, and the Role of Government*, in *LIBERTY AND THE RULE OF LAW* 208, 209 (R. Cunningham ed. 1979) (under liberal theory, public realm exists as result of contracts among private persons). It has also been condemned as a dichotomy with little normative or descriptive validity. See, e.g., Radest, *The Public and the Private: An American Fairy Tale*, 89 ETHICS 280 (1979).

liberty. It refers to freedom from governmental<sup>20</sup> or other outside<sup>21</sup> interference with decisionmaking and conduct, especially respecting appropriately private affairs. "Appropriately private affairs" is a highly value-laden concept. Its extension is construed to include matters generally regarded as intimate or personal. As a normative distinction,<sup>22</sup> the public/private distinction presupposes that certain concerns ought to be left to nongovernmental, family, or individual interests. It is often said that intimate, personal affairs ought to be private affairs because of their close association with attributes of identity and moral personhood.<sup>23</sup>

The concept of decisional privacy has been relied upon in constitutional cases and in commentary on constitutional cases relating to abortion,<sup>24</sup> contraception,<sup>25</sup> and homosexuality.<sup>26</sup> It has also arisen in connection with the right to choose one's own spouse,<sup>27</sup> to rear children in accordance with one's own religious values,<sup>28</sup> and to possess sexually explicit materials in one's own home.<sup>29</sup>

20. For example, the right to privacy at issue in *Griswold v. Connecticut* was freedom from governmental interference. 381 U.S. 479, 485-86 (1965) (state anticontraception laws unconstitutionally abridge right to privacy).

21. For example, among the decisional privacy issues raised by the "Baby Jane Doe" neonatal nontreatment case was whether a person, not the government, *outside* the family circle was entitled to interfere with parental choice. See *Weber v. Stony Brook Hospital*, 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (per curiam) (unrelated lawyer denied right of intervention through guardian ad litem on behalf of handicapped newborn), *cert. denied*, 464 U.S. 1026 (1983). Supreme Court cases reviewing spousal and parental notification and consent requirements raise the issue of the constitutionality of decisionmaking free from interference by government. See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-93 (1983) (plurality opinion); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439-40 (1983); *Bellotti v. Baird*, 443 U.S. 622, 648, 649-50 (1979) (plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976). However, they also raise questions about the right to procreative choice free of unwanted interference by "outsiders" who are within the family circle, but whom the individual may wish to exclude. See *Ashcroft*, 462 U.S. at 490-93; *Akron*, 462 U.S. at 439-40; *Baird*, 443 U.S. at 638-49; *Danforth*, 428 U.S. at 69-75.

22. There are purely descriptive uses of the public/private distinction, as where government employers are termed "public" employers and nongovernment employers are termed "private" employers.

23. Cf. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 281 (1977) (privacy is control over or autonomy of intimacies of personal identity). See generally L. TRIBE, *CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS* 886-98 (1978) (attempting to classify kinds of interests that count as privacy).

24. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

25. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

26. See, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

27. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

28. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

29. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969).

*B. Privacy vs. Liberty in the Abortion Cases*

Some theorists have argued that, although the concept of privacy has a place in the law, it does not have a place in abortion rights cases. They maintain that the concept of privacy must be carefully distinguished from the concept of liberty, and that the Supreme Court's right-to-privacy jurisprudence in abortion cases is flawed by the confusion of liberty with privacy. They conclude that the jurisprudence of abortion rights is not properly a jurisprudence of privacy.<sup>30</sup>

Circumspect usage of terms with key moral and political applications is indeed always important. Conceptual confusion in the law is worrisome; in constitutional law it is particularly worrisome in light of the paramount political values and individual interests at stake. Language must not be permitted to impede justice or obfuscate its requirements. However, now that the distinction between the restricted access usage and the decisional usage of privacy is commonly made and accounted for,<sup>31</sup> and now that it is understood that "privacy" typically means decisional privacy in abortion cases, there is not much left of the conceptual confusion argument for purging privacy talk from discourse about procreative liberties. Even purists who do not approve of the decisional privacy usage of "privacy" can appreciate the existence of a legal convention whereby "privacy" in abortion cases denotes an aspect of liberty, namely, the absence of governmental coercion respecting appropriately private affairs.

It must be granted to proponents of the "conceptual confusion" objection to decisional privacy arguments that early reproductive rights cases reflected a lamentable degree of confusion about the meaning of "privacy" and the relationship between privacy and private choice. In *Griswold v. Connecticut* Justice Douglas seemed to conflate privacy and private choice when he raised the spectre of government agents spooking the sacred precincts of the marital bedchamber to enforce criminal contraception laws.<sup>32</sup> The privacy of restricted access to the marital bedroom is certainly a reason to favor the decisional privacy of free contraceptive choice. But Justice Douglas' words can be read to imply that the constitutional right of privacy on which his opinion ultimately rested was essentially a restricted access rather than a decisional privacy right.

30. See, e.g., Ely, *supra* note 17, at 932-33. Cf. Gavison, *supra* note 11 (arguments that "privacy" does not aptly apply to procreative freedom); Parent, *supra* note 11 (same).

31. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

32. 381 U.S. 479, 485-86 (1965).



Justice Blackmun in *Roe v. Wade* seemed to conflate restricted access privacy rights with decisional privacy rights when he relied upon his metaphysically suspect belief that a "pregnant woman cannot be isolated [presumably, from the fetus] in her pregnancy"<sup>33</sup> as a ground for limiting her decisional prerogatives. His remark assumes, first, that pregnant women inherently lack privacy, and, second, that the claim to decisional privacy is necessarily weaker where one does not possess privacy in the restricted access sense. The first assumption is a matter of metaphysical and ethical opinion rather than of simple fact. Whether one believes that pregnant women inherently lack solitude depends upon the moral status one ascribes to the fetus. The truth of Blackmun's first assumption also depends upon how privacy is conceived. Arguably, the mere presence of a being incapable of perceiving or understanding human conduct does not diminish isolation or any other form of privacy.<sup>34</sup> The second assumption can be thrown into doubt by considering Judith Thomson's hypothetical in which a person finds that she has been kidnapped by music lovers, taken to a hospital, and attached by doctors to a dying violinist who would expire without her life-support.<sup>35</sup> Surely the mere fact that she is not "isolated" from the violinist can have no moral bearing on whether she has a right to decide whether to remain by his side for the nine months his recovery would require.

With the benefit of hindsight and interpreting each of their opinions as a whole, it is apparent that the basic right to privacy Justice Douglas and Justice Blackmun sought to apply in *Griswold* and *Roe* was a right of decisional privacy. Now that the major conceptual confusion about what the Justices meant is dispelled, there remains the crucial substantive interpretative question of whether a right to decisional privacy broad enough to protect abortion choice is implicitly guaranteed through the Constitution's reservation of zones of private decisionmaking and conduct.<sup>36</sup> And assuming such a decisional privacy right is constitutionally guaranteed, there also remains the question of what burdens for judicial review the right imposes on the Court. These questions are the focus of Part III of this Article.

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33. 410 U.S. 113, 159 (1973).

34. Cf. Garrett, *The Nature of Privacy*, 18 PHIL. TODAY 263, 264 (1974) (privacy defined as limitation on access of one or more entities to entity that possesses experiences).

35. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-49 (1971).

36. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2184 (1986).

Today it is clear that the fundamental constitutional issue underlying Supreme Court abortion cases has been private choice rather than privacy. This is not to suggest that privacy itself has nothing to do with abortion rights. It is now recognized by the Court that certain forms of privacy in the restricted-access sense are needed to safeguard decisional privacy.<sup>37</sup> Important forms of privacy are ancillaries to private choice. Cases reviewing the constitutionality of spousal or parental notification and consent requirements,<sup>38</sup> and cases reviewing abortion record-keeping and reporting requirements,<sup>39</sup> have raised anonymity, secrecy, confidentiality, and other information access concerns. Seclusion and solitude concerns are raised by state abortion control laws that can only be enforced through access to women's bodies by government or its surrogates.<sup>40</sup> Interestingly, in *Roe v. Wade* the Supreme Court rejected all limitations on the power of states to regulate abortion that are premised on a woman's alleged privacy right to control physical access to her body.<sup>41</sup>

37. See, e.g., *id.* at 2182 ("A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly.").

38. See, e.g., *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 662 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

39. See, e.g., *Thornburgh*, 106 S. Ct. 2169.

40. Seclusion and solitude privacy concerns have not had a major role in abortion cases. However, they were raised by Justice Douglas' remarks about the perils to the privacy of the marital bedroom posed by the spectre of enforcement of contraception law. *Griswold*, 381 U.S. at 485-86. Antiabortion laws could raise the same enforcement problems contraception laws raise were convenient abortion pills or other abortifacients intended for home use available to women. (The recently publicized "once a month" pill, RU 486, developed by French researchers, is an abortion pill. It blocks the action of progesterone and prevents implantation of fertilized eggs. Murphy, *The Month-After Pill: French Doctors Report a New Approach to Birth Control*, TIME, Dec. 29, 1986, at 64.)

The requirement of the presence of a second physician during "late-term" abortions raises a restricted access privacy issue. From the point of view of the woman undergoing an abortion, an unwanted second physician is an intruding government surrogate. However, it was not for reasons of constitutionally protected seclusion that the Court invalidated the second physician requirement contained in Pennsylvania's Abortion Control Act. See *Thornburgh*, 106 S. Ct. at 2182-84.

41. The bodily ownership and control argument for abortion seems to have been rejected in *Roe*, 410 U.S. at 152-54. The Court expressed doubt about the existence of "an unlimited right to do with one's body as one pleases." *Id.* at 154. The Court also denied that a pregnant woman can be "isolated in her privacy." *Id.* at 159.

Pro-life activists have urged that abortion, not antiabortion, is the greater affront to women's ownership and control over access to their bodies. See, e.g., Cunningham, *Is Abortion a Women's Issue?: Pro-life*, 5 UPDATE 6, 46 (1981) ("The abortion procedure is . . . a radical invasion of the woman's body. It is 'a denial of one of those powers which make women women. Child-bearing is basic to them. . . . To put it bluntly, an abortion amounts to a mutilation of the woman's body and a denial of her nature.'") (quoting

Forms of privacy such as confidential record-keeping are judicially recognized ancillaries of decisional privacy. I will now point to noteworthy respects in which decisional privacy is itself an ancillary of paradigmatic forms of privacy. This reality and its relevance to procreative rights have not yet gained the public or judicial recognition they deserve. In the next section I argue that abortion is an effective tool women can use to assure adequate privacy in their private lives. Plainly, abortion has other important uses. Access to abortion spares women for whom pregnancy is an unreasonable health risk, who have been raped, who are too young for responsible parenting, or who are very poor, from dramatically ruined lives. The potential for ruin goes far beyond the loss of privacy. In focusing on arguments for abortion based on the importance of privacy, I do not intend to discount the other compelling arguments for a permissive national abortion policy.

## II. MALE IDEOLOGY

### A. *Privacy Against Women*

For some feminists, "privacy" and "private affairs" connote conditions of female confinement and subjugation in the home.<sup>42</sup> They connote the lack of both privacy and private choice for women. Catherine MacKinnon has argued that the decisional privacy rationale of *Roe* is "male ideology." Mere legal rights do not assure women freedom of procreative choice if men continue to control sex.<sup>43</sup> MacKinnon debunked privacy and decisional privacy by describing

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Smith, *Abortion as a Feminist Concern*, 4 HUM. LIFE REV. 62, 67 (1978)). It may be inconsistent for pro-lifers to maintain both that the fetus is another person and that abortion is mutilation of women's bodies. In any event, the pro-life argument untenably implies that for a woman, not wanting to bear a child is akin to perversion. It supposes that a pro-choice society perverts women. I find no semblance of plausibility in these claims. They imply the insult that women who do not wish to have children or cannot bear them are unnatural and less womanly.

42. See, e.g., Okin, *Women and the Making of the Sentimental Family*, 11 PHIL. & PUB. AFF. 65, 88 (1985). See generally J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (1981) (Western philosophy promoted conception of women as belonging to private sphere in condition of inequality).

43. MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (J. Garfield & P. Hennessey eds. 1984). MacKinnon's argument is that *Roe* does not go far enough toward effecting the radical change needed to improve the status of women, but it is not an argument against procreative freedom for women. A similar argument, but one aimed against procreative free choice for women, depicts *Roe* as having gone too far. See, e.g., Cunningham, *supra* note 41, at 46 ("Abortion is . . . a successful means of keeping women as sex objects . . . [I]f through some 'accident' the woman gets pregnant, her lover . . . can escape the responsibility . . . [by offering] to pay for the abortion. It is the ultimate in the exploitation of women.").

them as the right of men to be let alone to oppress women one at a time.<sup>44</sup>

There is ample evidence that women's relationship with privacy has been difficult.<sup>45</sup> On the whole, women have had too much of the wrong kinds of privacy. They have had modesty, chastity, and family homes when what they have needed are the forms of privacy that foster moral independence. Traditional caretaking roles have kept women's lives centered in the privacy of the nuclear family home. Conventions of female chastity and modesty have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression. Expectations of emotional intimacy have fostered beneficial personal ties. At the same time, women's prescribed roles have limited their opportunities for individual forms of privacy and independently chosen personal association. Maternal and social roles have kept women in the private sphere who might otherwise have distinguished themselves in the public sphere as businesswomen, scholars, government leaders, and artists.<sup>46</sup>

Nearly a hundred years ago feminist Charlotte Perkins Gilman pointed out some of the many respects in which the traditional roles of homemaker, wife, and mother are inconsistent with individual forms of personal privacy.<sup>47</sup> For many women, homelife has been anything but a haven for the experience and enjoyment of personal privacy. Meaningful opportunities for personal privacy consist of time and a place for oneself. Caretakers cannot seclude themselves. Successful mothering demands that women be highly accessible and highly responsive to the wants and needs of their children. Incredibly, full-time housewives spend more time on housework today than they did in 1900.<sup>48</sup> Women in full-time jobs outside the home spend thirty-five hours a week keeping house.<sup>49</sup> A substantial per-

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44. MacKinnon, *supra* note 43, at 49.

45. Using historical and legal examples, I have elaborated elsewhere the points made in this paragraph. A. ALLEN, *supra* note 13, at 54-81.

46. Cf. S. DE BEAUVOIR, *THE SECOND SEX* 669-73 (1952). According to de Beauvoir, women are isolated in femininity and will not make public contributions until they can emerge in sovereign solitude. *Id.*

47. C.P. GILMAN, *WOMEN AND ECONOMICS* 257-69 (1898).

48. Cowan, *Housework: Why I Love/Hate My Clothes Washer*, Wash. Post, Feb. 15, 1987, at C3, col. 1. Housewives spent fifty hours a week on housework in 1900, but sixty to seventy hours on housework in 1980. *Id.* See generally L. PEATTIE & M. REIN, *WOMEN'S CLAIMS: A STUDY IN POLITICAL ECONOMY* (1983) (women's economic claims against state within family and in work world); *THE POLITICS OF HOUSEWORK* (E. Malos ed. 1980) (essays examining effect of women's roles and relationships at home on their political status).

49. Cowan, *supra* note 48.



centage of these women also have children to care for.<sup>50</sup> It is likely that parenting is still a greater day-to-day psychological burden on mothers than on fathers. The bearing these trends will prove to have on women's permanent entry into the public realm as equal participants and contributors remains to be seen.

All of this suggests that, for the sake of privacy, women ought to take special care when deciding whether to have children. Privacy has many useful functions for individuals in a democratic society.<sup>51</sup> More importantly, however, privacy is something human beings appear to need<sup>52</sup> for psychological well-being<sup>53</sup> and for the development of individuating traits called for by moral personhood and self-determination.<sup>54</sup> Procreative rights do not automatically entail privacy and self-determination for women. Decisional privacy translates into opportunities for salutary, individual modes of personal privacy only where, first, women's decisional freedom is not preempted by insurmountable social barriers to the exercise of legally protected choice and, second, free women with a choice are willing to choose privacy. Procreative rights are tools women can use, and are already using, to create opportunities for privacy in private life. This is why privacy and decisional privacy cannot be dismissed as mere male ideology.

### B. *Women Against Privacy*

Popular perspectives on women's psychology assert that women do not want privacy or liberty as men define it.<sup>55</sup> They want something better. It is maintained that women seek ongoing intimacy,

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50. According to U.S. Bureau of Labor and Bureau of the Census Statistics, in 1986, 46.6 million American women, approximately 55%, were in the labor force. Of these, 17.5 million had children and 13.8 million had husbands. Hacker, *Women at Work*, N.Y. Rev. Books, Aug. 14, 1986, at 26, 29, 30.

51. See generally A. WESTIN, *PRIVACY AND FREEDOM* 32-39 (1967) (personal autonomy, emotional release, self-evaluation, and limited and protected communication); Gavison, *supra* note 11, at 428-33 (secrecy, anonymity, and solitude).

52. Cf. B. MOORE, *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 73-80 (1984). According to Moore, privacy is not a need in the sense in which air and water are human needs, but it is a social need that arises in response to the desire to escape perceived threats and offensive intrusion. *Id.*

53. Cf. I. ALTMAN, *supra* note 13; C. SCHNEIDER, *SHAME, EXPOSURE, AND PRIVACY* 40-55 (1977).

54. Numerous theorists have located the value of privacy in its ability to create and enhance personhood. See, e.g., Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39-44 (1976). See generally 13 NOMOS: *PRIVACY*, *supra* note 14 (essays on value of privacy in diverse cultures).

55. See generally J. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976) (exploring role of autonomy and related moral values in women's psychology); C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (same).

affiliation, and responsible community life rather than solitudinous and anonymous forms of privacy.<sup>56</sup>

Virtually by definition, extreme and long-lasting conditions of privacy are inconsistent with ideals of intimacy, of community, and of moral responsibility.<sup>57</sup> To admit this is not to concede that women should reject solitudinous and anonymous forms of privacy. Wrongful patterns and instances of privacy can be rejected on moral grounds without abrogating privacy itself. To evaluate privacy's worth, we need to make particularized inquiries into how privacy is being used. We need to consider the morally relevant implications of privacy's use in given contexts.<sup>58</sup> Women who seek and utilize opportunities for privacy, e.g., to rejuvenate or to cultivate talents, are women with something qualitatively better to offer others. A degree of privacy in our lives can help to make us more fit for social participation. It can help us to contribute up to the level of our capacities. Procreative rights promote privacy by helping women preserve and create opportunities for privacy in the context of responsible lives.

### III. JUDICIAL OVERREACHING

#### A. *Roe and Its Critics*

*Roe v. Wade*<sup>59</sup> and *Doe v. Bolton*<sup>60</sup> began the Supreme Court's articulation of a decisional privacy rationale for invalidating impermissive state abortion laws. Subsequent Supreme Court cases have clarified the meaning and the limits of the constitutional right of privacy.<sup>61</sup> The right was first applied against legal barriers to pro-

56. J. MILLER, *supra* note 55; C. GILLIGAN, *supra* note 55.

57. Cf. Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1 (1983) (assessing extent to which personal privacy is consistent with social values).

58. Cf. Weinstein, *The Uses of Privacy in the Good Life*, in 13 NOMOS: PRIVACY, *supra* note 14, at 92 (privacy cannot be dismissed as unconditionally immoral, as social alienation, as loneliness, etc.). Few moralists with clear-cut normative ethical theories have examined either privacy or decisional privacy closely. We could expect moral deontologists to consider the implications of privacy or decisional privacy for some categorical moral good, such as personhood. See, e.g., Reiman, *supra* note 54. Moral teleologists could be expected to consider the implications of privacy or decisional privacy for prescribed goals or purposes, such as the greater balance of enlightened happiness over unhappiness. See, e.g., J.S. MILL, ON LIBERTY (1859) (utilitarian defense of extensive spheres of private choice).

59. 410 U.S. 113 (1973).

60. 410 U.S. 179 (1973).

61. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169 (1986); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439

creative choice in the *Griswold* case.<sup>62</sup> Post-*Roe* cases have illuminated the Court's understanding that the right of privacy is really an aspect of constitutionally protected liberty. The Court has interpreted the decisional privacy right as an aspect of negative liberty,<sup>63</sup> liberty powerful enough to countermand coercive legislative barriers to procreative choice in the first two trimesters of pregnancy, but not powerful enough to require governmental funding for nontherapeutic abortions, even where such funding is available for childbirth.<sup>64</sup> The Court has held that minors have a constitutional privacy right protecting abortion choice.<sup>65</sup> However, it has understood that right to be consistent with parental notification and consent requirements motivated by paternalism in the case of girls who have not been adjudicated mature.<sup>66</sup>

In broad outline, the Supreme Court's decisional privacy argument for permissive abortion policies can be simply stated. It starts with the premise that the Constitution protects important forms of liberty. Protected liberties include the liberty to make for oneself some of the choices that deeply affect personal identity, sexuality,

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U.S. 379 (1979); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Guste v. Jackson*, 429 U.S. 399 (1977); *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976), *overruled*, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Bigelow v. Virginia*, 421 U.S. 809 (1975). Cf. Note, *The 1983 Abortion Decisions: Clarification of the Permissible Limits of Abortion Regulation*, 18 U. RICH. L. REV. 137 (1983).

62. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state statutes criminalizing contraception).

63. Cf. S.I. BENN & R.S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 248-49 (1959) (concepts of positive and negative liberty distinguished); L. TRIBE, *supra* note 23, at 889 (freedom cannot be protected by placing identified realms of thought beyond reach of government control; freedom cannot be defined wholly in negative language describing what government cannot do).

64. *Harris v. MacRae*, 448 U.S. 297, 316-17 (1980) (due process liberty recognized in *Roe* does not encompass woman's entitlement to funds to avail herself of protected choices); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (state may withhold funds for abortion even though childbirth would be funded). See generally Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L.Q. 313 (1981) (discussing *Maher*, *Poelker*, and *MacRae* decisions and their impact on *Roe*).

65. For a list of cases discussing minors' constitutional privacy right protecting their abortion choice, see *supra* note 38.

66. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (invalidity of blanket statutory restriction does not mean all minors may give consent to abortion regardless of age or maturity); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (pregnant minor must show either sufficient maturity and informedness to make abortion decision, or that such decision is in her best interests); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439-40 (1983) (state must provide adequate procedures allowing minor to demonstrate sufficient maturity to exercise abortion rights without parental notification or consent); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493-94 (1983) (statute allowing judicial consent on proof of sufficient maturity upheld).

marriage, procreation, the home, and family life. Choice whether to bear a child is just such a choice. State laws that criminalize and intrusively regulate abortion unlawfully interfere with constitutionally protected liberty. Only at the stage at which protecting fetal life and maternal health becomes compelling may access to elective abortions be restricted.<sup>67</sup>

Simple to state in broad outline, the Court's argument is harder to defend.<sup>68</sup> The argument relies upon the illusive concept of fetal "viability." At the time of *Roe* it was generally thought that a fetus of twenty-eight weeks could survive outside the womb. Medical experts report difficulty in pinpointing the date at which a fetus can be expected to survive *ex utero*. But some now place viability at twenty-four weeks.<sup>69</sup> Meanwhile, liberals and conservatives alike reject "viability" as the ethically critical moment when the state may assert a compelling interest in protecting fetal life and curtailing free choice.<sup>70</sup>

The *Roe* argument is also difficult to defend because it rests on complex normative and factual premises that implicate basic controversies of American jurisprudence concerning standards of judicial review and constitutional interpretation.<sup>71</sup> *Roe's* critics have alleged that its jurisprudential assumptions are a house of cards.<sup>72</sup> Admit-

67. *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point . . . is at . . . the end of the first trimester. . . . With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

68. For discussion of the legal and social issues posed by *Roe*, see generally ABORTION: MORAL AND LEGAL PERSPECTIVES, *supra* note 43 (legal and philosophical essays on moral, political, and legal problems of abortion); N. DAVIS, FROM CRIME TO CHOICE (1985); THE LAW AND POLITICS OF ABORTION (C. Schneider & M. Vinovskis eds. 1980) (essays on public attitudes on abortion before and after *Roe*, analysis of voting behavior in presidential elections, abortion law before *Roe*, the fetus's legal status, and abortion funding cases); E. RUBIN, ABORTION, POLITICS AND THE COURTS (1982); L. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES (1980) (source book on doctrine of abortion privacy).

69. Cf. Grimes, *Second-Trimester Abortions in the United States*, 16 FAM. PLAN. PERSP. 260, 264 (1984) (*ex utero* survival of fetus younger than 24 weeks not reliably documented). The Supreme Court has itself noted the disagreement among medical experts about the determination of the date of viability. See *Colautti v. Franklin*, 439 U.S. 379, 396 (1979).

70. See, e.g., Englehardt, *Viability, Abortion, and the Difference Between a Fetus and an Infant*, 116 AM. J. OBSTET. & GYNECOL. 429 (1973); Rhodern, Stubblefield, Benshoof & Callahan, *Late Abortion and Technological Advances in Fetal Viability*, 17 FAM. PLAN. Q. 160 (1985); Note, *Genetic Screening, Eugenic Abortion, and Roe v. Wade: How Viable is Roe's Viability Standard?*, 50 BROOKLYN L. REV. 113 (1983) (discussing whether state is entitled to restrict mother's decision to proceed with eugenic abortion in wake of *Roe*).

71. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 185-86, 355-99.

72. See generally L. TRIBE, *supra* note 23, at 927 ("[N]othing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability . . ."); Coleman, *Roe v. Wade: A Retrospective Look at*



ting that "[h]aving an unwanted child can go a long way toward ruining a woman's life," John Hart Ely described the jurisprudence implied by *Roe's* constitutional privacy argument as nothing less than "frightening."<sup>73</sup>

David A.J. Richards, who has defended the outcome of *Roe* and its reliance upon a constitutional right of decisional privacy against its formidable opponents,<sup>74</sup> explained that critics of the right-to-privacy doctrine pose a twofold conundrum. First: "How can constitutional privacy, a right which is not textually rooted in any clause of the written constitution, be inferred with judicial fidelity to the interpretation of the terms of the Constitution?"<sup>75</sup> And second: "[A]ssuming the right is textually based in some form, how can such textual inference by [sic] squared with basic premises of the political theory of democratic self-rule that sharply limit the scope of proper judicial invalidation of majority rule?"<sup>76</sup> Critics of *Roe* assert that its decisional privacy argument mistakes the limits of judicial review and implies an untenable nonmajoritarian political morality.<sup>77</sup>

Critics pose third and fourth interrogatories as well.<sup>78</sup> Third: assuming, *arguendo*, that the Constitution is properly read to include a right of decisional privacy that can be applied to invalidate legisla-

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*a Judicial Oxymoron*, 29 ST. LOUIS U.L.J. 7, 19-26, 43 (1984) (survey of *Roe's* critics) ("The Court cannot vindicate individual rights by permitting abortion on demand."); Smith, *The Right to Privacy: Roe v. Wade Revisited*, in 43 JURIST 289, 316 (1983) (survey of *Roe's* critics) ("[The Court] failed to explain . . . why the right of privacy includes the right to terminate a pregnancy.").

73. Ely, *supra* note 17, at 935-36. "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure." *Id.* (footnote omitted).

74. D. RICHARDS, *supra* note 3, at 231-69.

75. *Id.* at 232.

76. *Id.*

77. See, e.g., Ely, *supra* note 17, at 937, 939 (in *Roe* as in *Lochner v. New York*, 198 U.S. 45 (1905), Court manufactured constitutional right and used it to superimpose its own view of good social policy on legislature). See generally J. ELY, *supra* note 7 (judicial appeal to nonneutral principles violates majoritarian ideal of government).

78. In Parts I and II of this Article I suggested answers to what amount to fifth and sixth interrogatories challenging the Court's right of decisional privacy jurisprudence. According to the fifth, *Roe* is flawed because the Court misconceived procreative liberty as privacy, when in fact the connection between abortion and privacy rights is "too tenuous and indirect to be credible." Sher, *Subsidized Abortion: Moral Rights and Moral Compromise*, 10 PHIL. & PUB. AFF. 361, 363 (1981). According to the sixth, *Roe* can be dismissed as "male ideology" because (1) it assumes that women have freedom of procreative choice once laws criminalizing abortion procurement and services are eliminated, because (2) women do not want privacy as men define it, or because (3) the sexually permissive culture *Roe* accommodates permits men to view and use women as sex objects.

tive enactments, how can that right be applied to invalidate laws prohibiting abortion, a practice that terminates human potential? Fourth: assuming that the due process clause protects decisional privacy as an aspect of liberty, how can it be concluded that the right to abort is a fundamental aspect of liberty, a fundamental right? Justices Rehnquist and White, who believe *Roe* ought to be overruled, have concluded that a right to abort is not fundamental since "it seems apparent . . . that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion."<sup>79</sup> The contractarian analyses considered below illuminate why these Justices are mistaken about the fundamental requirements of freedom and equal treatment. Freedom and equal treatment do not presuppose the precise "viability"-limited trimester approach to abortion access *Roe* established, but they do presuppose abortion policies no less permissive.

### B. *Answering the Critics*

How are the daunting challenges to *Roe* and its implicit jurisprudence to be answered? In delivering the opinion of the Court in *Roe*, Justice Blackmun asserted that the "Constitution does not explicitly mention any right of privacy."<sup>80</sup> He grounded his belief in the existence of an unenumerated fundamental right of privacy on a line of cases he deemed indicative of constitutional protection for fundamental privacy interests.<sup>81</sup> Blackmun relied on cases concerning the protection both of restricted access privacy interests<sup>82</sup> and of decisional privacy<sup>83</sup> interests.<sup>84</sup> The cases he cited had been de-

79. *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2192 (1986) (White, J., dissenting, with Rehnquist, J., concurring in White's dissent). Justice White further stated, "I cannot agree . . . that this liberty is so fundamental that restrictions upon it call into play anything more than the most minimal judicial scrutiny." *Id.* at 2194.

80. *Roe*, 410 U.S. at 152.

81. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

82. In this category, I would include the Court's reference to leading fourth and fifth amendment cases, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), and *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

83. In this category, I would include, for example, *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

84. In doing so, Justice Blackmun could have been conflating privacy and decisional privacy due to an imprecise grasp of what privacy means and how it is used. Another explanation is that Blackmun's majority opinion, like Justice Douglas' concurrence in *Roe*, implicitly assumed what members of the Court now clearly understand. They understand that (1) the concept of privacy is used to refer both to restricted access privacy (privacy *simpliciter*) and decisional privacy (private choice), see *Whalen v. Roe*,

cided by appeal to various amendments and their "penumbras."<sup>85</sup> However, he was most persuaded that the fourteenth amendment promise of liberty was the source of the constitutional right to decisional privacy.<sup>86</sup> When he delivered the opinion of the Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, Blackmun's effort to link the right of privacy to constitutional liberty was more confident.<sup>87</sup>

Blackmun's interpretation of the Constitution as embodying a substantive decisional privacy right through its guarantees of equal liberty has been criticized as reliance upon arbitrarily chosen non-constitutional values.<sup>88</sup> Critics taking a narrow view of judicial review have sought to argue on jurisprudential, historical, and political grounds that the courts lack authority to decide cases in reliance upon what they (the critics) denigrate as natural law, substantive due process rights, subjective morality, or the shifting tides

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429 U.S. 589, 599-600 (1977), summarized *supra* note 12; and that (2) the fourteenth amendment guarantees protection of all of the "zones of privacy" implied by liberty, *cf.* *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2200 (1986) (White, J., dissenting), whether "zones of privacy" in the restricted access sense or "zones of privacy" in the decisional privacy sense. What members of the Court disagree about is whether abortion choice is an appropriately private affair protected by constitutional liberty. It is worth noting here that the "zone of privacy" metaphor Justice Douglas used in *Griswold*, 381 U.S. at 484, and repeated in his concurring opinion in *Roe*, 410 U.S. at 209, is an example of a use of "privacy" that does more to obscure than to elucidate its denotative meaning.

85. The first, third, fourth, fifth, and ninth amendments, and their "penumbras" were pointed to as sources of privacy protection by Justice Douglas in the majority opinion in *Griswold*, 381 U.S. at 484-85. Again, Douglas' use of metaphor is obfuscating rather than clarifying. See *supra* note 84. This time it is the textual basis of the constitutional right to privacy rather than the denotative meaning of "privacy" that he needlessly mystified.

86. *Roe*, 410 U.S. at 153. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate the pregnancy." *Id.*

87. 106 S. Ct. 2169, 2184-85 (1986).

Our cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

*Id.* (citations omitted).

88. See, e.g., Ely, *supra* note 17, at 948-49; Comment, *Justice Harry A. Blackmun: The Abortion Decisions*, 34 ARK. L. REV. 276, 296 (1980).

of public opinion.<sup>89</sup> However, judicial fidelity to the Constitution does not preclude recognition of unenumerated substantive individual rights.<sup>90</sup> A broad view of judicial review accepts "the courts' . . . role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."<sup>91</sup>

The arguments for limiting constitutional adjudication by the literal interpretation of express provisions and by the historic intent of the Framers are unpersuasive.<sup>92</sup> If the Supreme Court has authority only within the "four corners" of the Constitution, then the Supreme Court has frequently erred for good. Judicial review could not have been adequately responsive to, for example, the demands of racial justice, were the Court limited by a "four corners" conception of review.<sup>93</sup> It is unclear how the judiciary could take the Constitution seriously if appellate review did not seek to bring about recognition and protection of the individual rights befitting the liberal society so constituted. I would venture to say that the Court has maintained its institutional credibility by refusing to treat the Framers' specific intent as dispositive of substantive rights in areas where social and economic life have given rise to amplified, just expectations of individual freedom, equality, and participation.

David A.J. Richards and Ronald Dworkin are among those legal philosophers who maintain that the judiciary cannot ignore substantive normative background principles that give meaning and interpretive coherence to the Constitution. In response to the twofold conundrum posed by critics, Richards crafted a theory stressing the powers of principled interpretation rather than the putative limitations of judicial review.

According to Richards, the intellectual history of the Constitution justifies appeal to nonenumerated fundamental background

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89. See, e.g., R. BERGER, *supra* note 7; Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 185 (Supreme Court must be criticized for using constitutional interpretation in *Roe* that allows it to define and balance major social and political interests).

90. Cf. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 397-99 (constitutional interpretation may remain sensitive to great complexity of political virtues bearing on issues).

91. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975).

92. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 359-73.

93. See generally Grey, *supra* note 91. Moreover, "[t]he United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions." R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 356.



rights.<sup>94</sup> Responding to the competing demands of text, history, politics, morality, and social change, Richards argued that strict constructivism must be rejected in favor of a contractarian, fundamental-rights-based approach to interpretation.<sup>95</sup> On this approach, the Constitution limits governmental constraints on conduct to those that rational persons could freely and unanimously accept. Richards did not choose social contract theory solely by virtue of any independent moral validity it may have. He chose it because "[t]o understand the self-conception of the American Constitution as a written constitution, legal interpreters must take seriously the contractarian moral ideal of community that actuates it."<sup>96</sup> Richards' theory can be understood as an effort to legitimate a conception of the Bill of Rights, the fourteenth amendment, and other constitutional clauses as a set of deontological constraints on government action, while at the same time showing respect for the Founders' intent for the form of government constituted by the written Constitution.

### C. *Abortion and Social Contract*

Richards argued that much of the text of the Constitution itself contemplated the inference of fundamental rights expressive of a theme of tolerance, including a right of privacy.<sup>97</sup> He elaborated a

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94. D. RICHARDS, *supra* note 3, at 255 ("The maintenance of a continuous yet vital constitutional tradition in the United States has required the Supreme Court to interpret relevant constitutional text in terms of abstract background rights . . .").

95. Why must strict constructivism be rejected? Richards elaborated five reasons. D. RICHARDS, *supra* note 3, at 34-37. First, the language of the Constitution is abstract; second, it is not reasonable in view of the abstract language employed to attempt to limit the language of the Constitution by its historic denotations; third, constitutional clauses derive their force and meaning from a larger political and moral culture that perceived the human rights embodied in these clauses as grounded in enduring and inviolable principles of justice; fourth, coherent interpretation of American constitutional law requires a historically self-conscious understanding both of the Founders' self-conception of their place in the history of republican thought, and of the interpretative development of constitutional doctrine over time; and fifth, strict constructivism is tied to a politically indefensible brand of legal positivism. *Id.*

96. *Id.* at 55. See also *id.* at 54, 55-56.

The idea of a written constitution does not arise in a historical and cultural vacuum. It flows out of deep currents in Western political and religious thought, and the moral ideal to which both political and religious thought points is contractarian. . . . The American Constitution . . . represents a historically unique attempt to use the best political theory and political science of the age, combined with a diverse practical experience of democratic self-rule, to create a written text of constraints on state power that would achieve in America what had never been achieved elsewhere . . .

*Id.* at 54-56 (footnotes omitted).

97. D. RICHARDS, *supra* note 3, at 256.

contractarian theory of the Constitution according to which a right to a sphere of private choice is a common good and a fundamental human right that a morally tolerant government may not abridge. As an example of the liberal contractarian treatment of abortion rights, I want to focus on Richards' view of why abortion rights must be deemed fundamental privacy rights for purposes of judicial review. Richards' liberal social contract theory is responsive to moral and political concerns about antiabortion laws commonly voiced by feminists (including feminists who are not liberal social contractarians). I believe Richards is right that abortion privacy rights must be deemed fundamental, but his account of the reason why they are fundamental is not convincing.

Feminism is sometimes construed as having its own permissive moral stance on abortion. What I shall refer to as the feminist moral stance on abortion has liberal,<sup>98</sup> egalitarian,<sup>99</sup> and Kantian<sup>100</sup> strands. First, feminism argues that whether women themselves choose to have children ought to be the determining factor in whether they are subjected to pregnancy and childbirth.<sup>101</sup> Women have the inviolable right to choose freely. This choice-emphatic claim is the liberal strand. Second, feminism argues that denial of freedom of choice to women entails that government fails to take seriously women's claims for equal treatment and full participation in society.<sup>102</sup> This equal-rights-emphatic objection is the egalitarian strand. Third, feminism argues that denial of choice treats women with moral disrespect.<sup>103</sup> Denial of procreative choice implies that it is fitting that women should be instruments of others' ends rather than persons in their own right. Women who are expected to live

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98. For a definition of liberalism, see *supra* note 6.

99. An egalitarian approach to social, political, or legal theory prescribes that, to the extent possible, persons ought to be treated as equals. Needless to say, conceptions of what treatment as equals requires vary greatly. Ronald Dworkin's writings, cited extensively in this Article, reflect a commitment to egalitarianism.

100. "Kantian" is used generically here to describe the anti-utilitarian perspective that persons are ends in themselves worthy of moral respect. Kant ascribed to human actors an absolute, categorical moral duty to refrain from treating persons as if they were mere things: "Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means." I. KANT, *GROUNDING FOR A METAPHYSIC OF MORALS* 36 (J. Ellington trans. 1980).

101. See Gould, *Private Rights and Public Virtues: Women, The Family and Democracy*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* 3, 13 (C. Gould ed. 1983) ("The right to abortion follows from the right to freedom of choice . . .").

102. K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 92 (1984) ("[T]hey argued that this right to abortion was essential to their right to equality.").

103. *Id.* (abortion right demanded was right to be treated as individuals rather than as potential mothers). See generally E. KLEIN, *GENDER POLITICS* 47-68 (1984) (survey of feminists' moral beliefs respecting birth control and motherhood).

lives as wives and mothers—whether or not they prefer to—are used by government and the male-dominated society. This is the Kantian strand.

How may the Supreme Court's treatment of private abortion rights as fundamental be defended? How can we justify not leaving the matter to individual states and their majoritarian legislative institutions to decide? The problem with criminalizing abortion, Richards argued, is that it debases moral independence.<sup>104</sup> To make abortion a crime is to hold women hostage to beliefs they reasonably reject about the value of fetal life. Richards' account<sup>105</sup> of the respects in which abortion restrictions debase moral independence is deeply responsive to the three strands of feminist concern.<sup>106</sup> His emphasis on "the moral independence of women as free and rational persons," expressed through private choice, is responsive to the liberal strand in the feminist stance. The contention that such private choice is required by the elimination of "gender hierarchy" is responsive to the egalitarian strand. The insistence that women and their bodies are not "the property of others," to be put to use in the service of others' ends, is responsive to the Kantian or anti-utilitarian strand.

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104. D. RICHARDS, *supra* note 3, at 268.

The traditional condemnation of abortion fails, at a deep ethical level, to take seriously the moral independence of women as free and rational persons, lending the force of law to theological ideas of biological naturalness and gender hierarchy that degrade the constructive moral powers of women themselves to establish the meaning of their sexual and reproductive life histories. The underlying conception appears to be not discontinuous with the sexist idea that women's minds and bodies are not their own, but the property of others, namely, men or their masculine God, who may use them and their bodies for the greater good. The abortion choice is thus one of the choices essential to the just moral independence of women, centering their lives in a body image and aspirations expressive of their moral powers. The abortion choice is clearly a just application of the constitutional right to privacy, because the right to the abortion choice protects women from the traditional degradation of their moral powers, reflected in the assumptions underlying antiabortion laws.

*Id.* (footnotes omitted).

105. Richards' argument is quoted *supra* note 104.

106. I do not think this point is trivialized by the fact that, like Richards, some of the most influential liberal, egalitarian, and Kantian thinkers also embraced some form of social contract theory. For example, liberal egalitarian John Rawls is also a contractarian. See generally J. RAWLS, A THEORY OF JUSTICE 11-17, 60-65 (1971) (cooperating individuals under ideal hypothetical conditions select two basic principles of justice for assigning rights and duties and dividing social benefits: each person has equal right to basic liberty compatible with liberty for others, and social and economic inequalities are to be to everyone's advantage and to be attached to positions open to all). Kant accepted elements of social contract theory. H. WILLIAMS, KANT'S POLITICAL PHILOSOPHY 97-114, 162-82 (1983).

The responsiveness of Richards' account to major strands in the feminist abortion stance is not a reason to conclude that the feminist stance is essentially contractarian. As a matter of fact, Richards' perspective on the respects in which abortion prohibitions debase moral independence is not itself essentially contractarian. Notwithstanding its consistency with his inventive articulation of social contract theory as the political morality underlying the Constitution, Richards' account lacks uniquely contractarian premises. It is rather a composite of generically liberal, egalitarian, and Kantian claims. While Richards' conception of how lack of abortion choice debases moral independence is not uniquely contractarian, elements of his actual argument against antiabortion laws are uniquely contractarian. Ironically, the weakest element of Richards' abortion argument may be weak because he overlooks a serious requirement of his own contractarianism: namely, the need for a contractarian justification for leaving out the fetal point of view.

What makes fetal survival so unimportant that fetuses may be terminated by women in the exercise of their independent moral powers? Why is abortion not unlawful murder, justly prohibited under state law? Richards maintained that fetuses are neither persons subject to protection by government in virtue of possessing moral personality, nor general goods subject to government protection as numbering among those things rational persons would unanimously agree merit protection. Fetuses are not persons, he asserted, because to be a person one must have the "relevant characteristics of . . . a person—at a minimum, the capacity for self-consciousness, agency, and the like."<sup>107</sup> Fetuses are not general goods because, according to the theory of general goods,<sup>108</sup> the lives of nonpersons could be general goods only if they were "so necessary to the lives of all rational people that each person could reasonably accept necessary protections of such goods by the criminal law even at the cost of essential interests in moral independence."<sup>109</sup> The interest in moral independence is essential because moral independence is a prerequisite of meaningful moral personhood. As a prerequisite of moral personhood, moral independence is presupposed by the ideal of the free and democratic society. In a society of rational and free citizens, moral independence must be a fundamental right. That is,

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107. D. RICHARDS, *supra* note 3, at 264.

108. The theory of general goods is the component of social contract theory "which expresses the kind of . . . constraints imposed on [governmental] abridgment of conscience and privacy." *Id.* at 267.

109. *Id.*



it must be a right that cannot be trumped by arguments of social utility or majority preferences.

The termination of fetal life is not a legally cognizable harm under the social contractarian theory Richards advances because fetuses lack moral personality and their survival is not a general good. On the other hand, because moral independence is a general good, women are harmed when they are deprived of moral independence by antiabortion laws that policy-makers justify by appeal to a state interest in protecting fetal life or to majoritarian preferences. Antiabortion legislation unconstitutionally abridges women's fundamental right to moral independence in the appropriately private sphere of procreative autonomy.

Richards did not offer an explicit social contractarian argument for his conclusion that fetuses are nonpersons. Surprisingly, he relied on bare assertion.<sup>110</sup> He did offer an explicit contractarian argument for his conclusion that, since fetuses are nonpersons, government may not protect their lives by criminalizing abortion. In that instance he relied on a contractarian theory of general goods.<sup>111</sup>

As a contractarian Richards owes us an account of why potential persons should be excluded from the right-bearing class.<sup>112</sup> In providing such an account, the contractarian faces the special problem of explaining why fetuses are not parties to the hypothetical unanimous agreements that justify and limit government action. To be sure, fetuses lack rationality, self-consciousness, moral agency, and other traits that are the hallmarks of human personhood. The social contract is typically conceived as a hypothetical bargain struck by the aggregate of those affected by the exercise of power. That fetuses in the actual world are not rational moral agents does not explain why, in the hypothetical world to which the contractarian appeals where many features of the actual world are suspended, the point of view or self-interests of human fetuses should not be accorded the same weight as those of human beings at other stages of development. It is a powerful moral intuition that arbitrary contin-

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110. *Id.* at 264. I gather from correspondence with Richards that he asserts that fetuses are not persons on the strength of his conviction that abortion is not murder. Letter from David A.J. Richards to Anita Allen (Mar. 21, 1987). But, of course, to those who believe abortion is murder to which we have allowed ourselves to grow indifferent, and to those who are uncertain, Richards' assertion must seem to lack adequate justification.

111. *Id.* at 267. John Rawls' contractarian account of the principles of justice included an equivalent theory, that is, the theory of "primary goods." J. RAWLS, *supra* note 106, at 90-95.

112. Rawls sketched such an account. J. RAWLS, *supra* note 106, at 509.

gencies cannot be treated as relevant when we seek to do justice. Thus, for example, sex is now deemed irrelevant when voting rights are allocated. Significantly, noted contractarian John Rawls has suggested that potential personhood is a minimally sufficient condition for moral personality. Rawls suggested that it is an arbitrary contingency that potential persons are not now the persons they could be.<sup>113</sup>

To shore up the application of his contractarian constitutional theory to the abortion controversy, Richards must give a contractarian argument for leaving out the fetal point of view. For pro-life *Roe* critics, the nature of the argument Richards would use to justify leaving out the fetal point of view is critically important to the plausibility of his abortion jurisprudence. The nature of that argument is also extremely important to critics like Ely who worry that *Roe* entails an unprincipled allocation of extraordinary private powers to one group (women) over another group (fetuses) that is virtually unrepresented in the democratic process.<sup>114</sup> Indeed, the view that *Roe* arbitrarily leaves out the interests of the pre-viable unborn has been a major criticism of *Roe's* permissiveness and the permissiveness entailed by the feminist moral stance on abortion.<sup>115</sup>

I join those who contend on various grounds that whether fetuses are persons *vel non* is not dispositive of the morality and legality of abortion.<sup>116</sup> Permissive abortion rights are called for even though fetuses have, or may have, moral personality. The abortion problem compels a squaring off of human potential—women's potential versus the potential of unborn life. The duel is between women's rights to the realization of their potential as human persons and (I am assuming) fetal rights to the same.

113. *Id.* ("I have said that the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice.").

114. See generally J. ELY, *supra* note 7; Ely, *supra* note 17, at 933-35 (although few women sit in on legislation, no fetuses do).

115. See, e.g., Swan, *The Thirteenth Amendment Dimensions of Roe v. Wade*, 4 J. JUV. L. 1 (1980). Cf. Dorsen, *Crushing Freedom in the Name of Life*, 10 HUM. RTS. 19 (1982) (critical analysis of implications of proposal that Constitution be amended to declare the unborn persons within meaning of Constitution); Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J.L. & MED. 98 (1982) (same).

116. See, e.g., Thomson, *supra* note 35; Smith, *Rights—Conflict, Pregnancy, and Abortion*, in *BEYOND DOMINATION*, *supra* note 101, at 264 (women's right of liberty overrides fetal welfare rights). But see Gould, *supra* note 101, at 13 ("If abortion did involve destruction of the life of a human being, this would justify limitations on a woman's freedom to decide on an abortion."); accord Feinberg, *Abortion*, in *MATTERS OF LIFE AND DEATH* 183 (T. Regan ed. 1980).

Valuable human potential is lost whether woman abort or whether they do not abort. The one and a half million abortions performed annually in the United States terminate a great deal of potential. But they promote a great deal of more distinct human potential as self-determining women are permitted to pursue education, spare their health, avoid child abuse and neglect, and focus on contributions outside the domestic sphere. Setting aside the question of rights for a moment, there would seem to be ample reason to prefer loss of fetal potential to loss of women's potential. From a public, goal-oriented perspective, society is better off if it adopts a legal policy choice favoring women's potential to that of fetuses. Surely it is better to have a society enriched because men and women each have the requisites of self-determination, participation as equals, and contributions up to their innate capacities, than simply to have a society of more people. There is something tragically absurd too, like the myth of Sisyphus, about a woman who is stunted by domestic and maternal roles, for the sake of unborn daughters who will grow up and face merely the same fate.

The nonconsequentialist argument for preferring women's potential to fetal potential is that it is inherently wrong to force women to sacrifice the realization of their potential so that others may realize theirs. Why is it wrong? Pro-choice liberals<sup>117</sup> who are bent on searching for neutral principles seek to justify abortion on the ground that abortion rights protect appropriately private affairs related to the inviolable body and personal identity. Or, they rely on the ground that the state cannot justly limit liberty on the basis of religious beliefs about the status of fetuses. Or, they appeal to the view that the state may not limit liberty on the basis of metaphysical beliefs about fetal status that are not proven and may not be subject to proof.

Ronald Dworkin's conception of liberal equality and the neutral constraints it entails has a contractarian dimension.<sup>118</sup> It can be exploited to provide Richards with the contractarian argument his permissive abortion rights argument needs. Unlike Richards, Dworkin has not aligned himself with social contractarianism as a political morality in terms of which the Constitution may be directly interpreted. But his affinity for social contractarian liberalism is apparent in the contractarian test he proposed in *A Matter of Principle* for

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117. See generally Voegel, *A Critique of the Pro-Choice Argument*, 43 REV. POL. 560 (1981) (critical survey of liberal pro-choice arguments).

118. R. DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 5, at 205. But cf. Dworkin, *The Original Position*, in READING RAWLS, *supra* note 4, at 16 (criticizing Rawls' conception of social contract).

determining whether government action (or inaction) passes muster with the liberal conception of equality. To preserve the constitutive principle of equal respect and concern, government "must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth."<sup>119</sup>

Dworkin did not apply this abstract constraint of equal respect to abortion. However, he did indicate that its application would oppose the moralism of the so-called Moral Majority and the New Right.<sup>120</sup> Throughout the 1980s, individuals identified by these labels have stood in opposition to abortion choice and demanded that *Roe* be overturned. As I interpret Dworkin's principle of equal respect, its application to the case of abortion rights yields a result that strongly favors decisional privacy for women. Specifically, antiabortion laws are morally and constitutionally invalid because the usual arguments of fetal potentiality, religion, or metaphysical uncertainty cannot be accepted by women without abandoning their sense of equal worth. To accept their pregnancy hardships by virtue of the fetal potentiality argument, women would have to accept the inference that their own potential is less important than the potential of the unborn. To accept the religious and moral arguments based on the value of fetal life and the family, women would have to accept that their own individual beliefs and moral consciences deserve no weight even though it is their lives that are most directly affected by the outcome of pregnancy.

Dworkin's contractarian conception of the requirements of equality gives rise to an argument for permissive abortion laws that avoids the problem uncovered in Richards' argument. The Dworkin-inspired contractarian argument does not assume that fetuses lack moral personality. It forces us to consider the morality of imposing both pregnancy sacrifices on women and abortion sacrifices on fetuses. Antiabortion legislation places a constraint on the pregnant woman by virtue of arguments she cannot accept without abandoning her sense of equal worth. The same is not true of permissive abortion legislation and the fetus. Abbreviated potential is a sacrifice the law imposes by virtue of an argument the fetus could reasonably accept without abandoning its sense of equal worth, simply through appreciation of the equal worth of the pregnant woman by whom it must be borne and her potential as a person. Preferring continued life to aborted life, the hypothetical reasonable fetus also

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119. R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 5, at 205.

120. *Id.*



prefers state protection to procreative choice. But, as our fetus understands, placing its fate in the hands of an individual woman is justified because it does not have to believe itself less worthy of respect than other human beings in order to accept that the law will not compel women to see each pregnancy to term.

Speculation about what a reasonable fetus could and could not accept without abandoning its sense of equal worth is admittedly strained. But the awkward contractarian exercise proves to have a morally interesting result. It illuminates why impermissive abortion laws that would limit women's potential as persons are morally less problematic than permissive abortion laws that limit fetal potential.

A great deal has been written about the problem of rights conflicts under social contract theory.<sup>121</sup> A great deal has also been written about the conflict of rights at stake in competing abortion policies.<sup>122</sup> What I have sought to contribute are the outlines of a contractarian rationale for viewing claims based on fetal well-being, potential, or rights as overcome by women's claims to the same rights.

Dworkin's conception of what equality requires is responsive to the liberal, egalitarian, and Kantian strands in the feminist moral stance on abortion. I suspect some feminists would reject liberal contractarian arguments for procreative choice even though they are responsive to key feminist concerns and even though, if Richards proves correct, they have special relevance to American constitutionalism. Social contractarian arguments are burdened by the assumption that the search for principles of justice proceeds by abstract appeal to what rational individuals could all accept or agree to. (Dworkin's contractarian interpretation of liberal equality justifies state constraint, not by appeal to unanimous rational acceptance as such, but by appeal to rational acceptance in principle without loss of the sense of equal worth.) What is good about this is that it gives play to ideals of consensual, participatory, and egalitarian government. But some women are now contending that the demands of justice must be determined, not abstractly, but contextually; not from the point of view of neutral principles, but from the point of view of moral responsibilities that arise by virtue of actual social re-

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121. See, e.g., H. BLOCKER & E. SMITH, *supra* note 4; M. SANDEL, *supra* note 4; Lyons, *supra* note 4.

122. See, e.g., Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 SYRACUSE L. REV. 565 (1982) (advocating position that fetus' interest in potentiality of life is at odds with woman's interest in controlling her life).

lations and conditions.<sup>123</sup> Both feminist<sup>124</sup> and nonfeminist<sup>125</sup> theorists have rejected social contract theory on essentially these grounds.

Social contract theory bases the allocation of rights and duties on conceptions of what the abstract reasonable person could accept. The concepts of "reasonable person" and "rational acceptance" are no doubt affected by prevailing social standards. In our society men are the politically, economically, and socially dominant sex. In the early years of the women's movement there were feminists who purported to reject rationality because they viewed it as an ideological construct used as a device of oppression to keep the irrational sex out of public life.<sup>126</sup> To the extent that it still exists, the antirationalist segment of the feminist community could be expected to balk at social contract theory on the ground that any contractarian conception of justice would presuppose a pernicious "male" view of the reasonable person and further sexual injustice. Contemporary academic feminists do not typically go to the extreme of rejecting rationality itself. However, some feminist scholars believe liberal social contract theory should be rejected because it overemphasizes rationality, pretends to value-neutrality, and assumes an unrealistic conception of persons as abstract, self-sufficient individuals.<sup>127</sup>

Contractarianism does not wholly collapse in the face of these now familiar charges of fundamental error. It is not a sufficient refutation of social contract theory to point out the obvious: that the method of hypothetical reasoning it employs characterizes persons abstractly when, in important respects, real individuals are inseparable from their personalities, values, social ties, and material contexts. Moreover, it has been plausibly argued that a nonneutral value—equal respect and concern—undergirds the best liberal, and presumably liberal contractarian, theories.<sup>128</sup> Opponents of social contract theory must explain why hypothetical abstraction about what individuals could accept is incapable of illuminating moral re-

123. Harding, *Is Gender a Variable in Conceptions of Rationality? A Survey of Issues*, in *BEYOND DOMINATION*, *supra* note 101, at 43, 54 (rationality not gender-neutral concept), 56 (although thought is formal and abstract, concept of justice could reflect specific social experiences).

124. Jaggard, *Human Biology in Feminist Theory: Sexual Equality Reconsidered*, in *BEYOND DOMINATION*, *supra* note 101, at 21, 24 (credibility of social contract theory derives from implausible assumptions about human nature and reason).

125. See, e.g., M. SANDEL, *supra* note 4 (nonfeminist philosophical criticism of Rawls and Dworkin).

126. See Harding, *supra* note 123, at 44, 45 (explaining feminist opposition to concept of rationality).

127. See, e.g., Jaggard, *supra* note 124, at 24-27.

128. R. DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 5, at 203-04.

sponsibilities or rights and why neutral principles are not justly employed in the pursuit of treatment as equals. Especially if Richards is correct that social contract theory has a privileged role to play in constitutional interpretation,<sup>129</sup> we should not quickly dismiss efforts to rely upon it to clarify the need for privacy and private choice.

### CONCLUSION

David Richards is correct in his identification of toleration as a major constitutional theme. I believe he is also correct in his argument that constitutional toleration requires decisional privacy rights, especially procreative decisional privacy rights. Antiabortion arguments discount the moral importance to women of decisional privacy. Arguments for abortion choice are often premised on the importance of decisional privacy. But they typically underemphasize or ignore the link in women's lives between private choice and privacy, between decisional privacy and opportunities for individual forms of personal privacy.

Imbedded in Richards' argument from the constitutional theme of toleration is an argument from the theme of self-determination. No human being is perfectly self-determining. But, for the sake of the degree of self-determination that makes personhood and responsible moral agency meaningful expectations, government must be tolerant of individual free speech, belief, and conduct.

Recognition of the theme of self-determination implicit in the constitutional theme of toleration highlights why sexual and procreative liberties are much more than necessary evils. Abortion rights are sometimes portrayed as necessary evils, even by members of the Supreme Court who support *Roe*.<sup>130</sup> They are depicted as evils

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129. Richards' writings on this topic include *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985); *The Aims of Constitutional Theory*, 8 U. DAYTON L. REV. 723 (1983); *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981); *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1 (1980); *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979); see also Richards, *Taking Rights Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265 (1977).

130. I have in mind Justice Stevens' concurring opinion in *Thornburgh*.

The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions. . . .

In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny.

*Thornburgh*, 106 S. Ct. at 2189-90 (Stevens, J., concurring).

needed to combat the even greater evils of unjustified state power and encroachment upon the appropriately private sphere. They are seen as rights women must be accorded, but begrudgingly, with the hope that they will do the correct thing and not exercise them.

Stressing the importance of privacy, I propose a more affirmative understanding of abortion rights. Women must have legally protected decisional privacy, and then be socially empowered to choose privacy in the form of salutary conditions of restricted access. The liberal conception of sexual equality is scarcely furthered by decisional privacy if women do not and cannot use their private choice to choose privacy. Merely having a legal right to choose does not insure meaningful moral independence. That comes from modes of education, work, and homelife that include opportunities for individual forms of personal privacy. Women can use these opportunities to work out and to live out their own conceptions of the good life.